exceeding $200 in each case as the Official Administrator may be satisfied is due to them respectively for expenses incurred. In other words, Low Oon Tong will in no case receive more than $400 in all, nor Low Tee Lam more than $600 in all in respect of such expenses.

[APPELLATE CRIMINAL JURISDICTION]
MURRAY-AYNSLEY, J.
July 22, 1938.

SUPRAMANIAM AND 3 OTHERS
v.
PUBLIC PROSECUTOR.

(PERAK MAGISTRATE'S CRIMINAL APPEALS Nos. 34, 35, 36 and 37 of 1938)

Criminal Procedure Code, S. 166—Penal Code, S. 160—Minor Offences Enactment, S. 25—charge of affray joined with charge of disorderly behaviour in public places in the alternative—accused charged with disorderly conduct only after an objection had been raised at hearing—irregularity whether curable.

Where the accused were charged with committing affray under Section 160 of the Penal Code and with disorderly behaviour in public places under Section 25 of the Minor Offences Enactment in the alternative, but, upon an objection being raised at the hearing as to the propriety of the joinder of the charges the magistrate charged the accused with an offence under which they had been charged in the alternative.

Held, that any irregularities that might have occurred in the events that had happened came within and were curable by Section 166 of the Criminal Procedure Code.

MAGISTRATE'S CRIMINAL APPEAL.

B. K. Das for the Appellants.

R. M. Cluer, Deputy Public Prosecutor, for the Respondent.

Murray-Aynsley, J. I can find no merits in these appeals as regards questions of fact and I do not consider the penalties excessive. However, Mr. Das has raised certain questions of procedure which need consideration. When first charged the appellants were charged under Section 160 of Cap. 45 and Section 25 of Cap. 46. Mr. Das during the hearing raised the point that persons could not be charged in the alternative with offences under the Penal Code and with offences under other Enactments. This objection is based on Indian views as to the meaning of the Indian equivalent of Section 166 Criminal Procedure Code. I am unable to follow the reasoning on which such a limitation is based. Confronted with this the Magistrate charged the Appellants with an offence under Cap. 46 viz., section 25 under which they had been already charged in the alternative. There was a verbal error in the new charge. The appellants were given an opportunity of having witnesses recalled for prosecution but did not avail themselves of it. Neither did any of them elect to give evidence.

In my opinion any irregularities that may have occurred are within the scope of Section 422 of the Criminal Procedure Code, and I consider that these appeals should be dismissed.

Appeals dismissed.

[APPELLATE CRIMINAL JURISDICTION]
MURRAY-AYNSLEY, J.
September 12, 1938.

GURUNATHAN CHETTIAR AND ANOTHER
v.
PUBLIC PROSECUTOR.

(PERAK MAGISTRATE'S CRIMINAL APPEALS Nos. 47 and 48 of 1938)

Minor Offences Enactment (Cap. 46), S. 35(i) —theft—insufficient evidence of—charge amended to one of fraudulent possession of property—whether amendment permissible.

Where a prosecution for theft breaks down for lack of or insufficient evidence, it is improper for the Magistrate to amend the charge to one of fraudulent possession of the stolen property under section 35 (i) of the Minor Offences Enactment. To succeed on the latter charge it must be shown that the possession of the article alleged to have been stolen is a suspicious circumstance within the meaning of the section, but possession of an article in common use such as an oil drum is not such a suspicious circumstance where there is no evidence that the article possessed is the one stolen.

If from the circumstances alleged against an accused it is impossible for the person in whose mind suspicions are aroused to say that he suspects that the goods were stolen and not fraudulently obtained or vice versa, a charge under section 35 (i) of the Minor Offences Enactment is not maintainable.

MAGISTRATE'S CRIMINAL APPEALS.

G. Terrell, for the Appellants.

R. M. Cluer, Deputy Public Prosecutor, for the Respondent.

Murray-Aynsley, J. This appeal raises two points—one as to the merits, the other as to a matter of procedure.

As regards the question of merits it is interesting to observe the history of the case. Apparently the Appellants were in the first instance charged with the

S. 35 (i) of the Minor Offences Enactment (Cap. 46) reads:—

"Any person who has in his possession or conveys in any manner anything which may be reasonably suspected of being stolen or fraudulently obtained shall, if he fails to account satisfactorily how he came by the same, be liable to a fine of fifty dollars, or to imprisonment for three months."

theft of a barrel. When evidence was called it became evident that the identity of the barrel stolen with that found in possession of the Appellants was the crucial point of the case, and it became equally clear that on that point the evidence for the prosecution was inadequate. In the circumstances the charge was amended to one under Section 35(i) of Cap. 46 (Minor Offences) on which the Appellants were convicted. But it seems clear that in the case of an article in common use such as an oil drum which was the article concerned in this case possession is not a suspicious circumstance where there is no evidence that the article possessed is the one stolen. In other words this sub-section should not be resorted to help out where a charge of theft breaks down. There is a legitimate use for this sub-section, e.g., where a beggar is found with a gold watch and no charge of theft can be preferred because the owner cannot be traced, but in this present case the use was not legitimate, and a provision such as this can be oppressive if it is invoked in cases where its use is not legitimate. The conviction must be quashed.

In view of this it is not necessary to examine in detail the other point, but my view is that there is here no difficulty. The act charged is the possession. There must be circumstances which give rise to suspicion of one of two things but it is obvious that where the circumstances arise it would be impossible for the person in whose mind the suspicions were aroused to say that he suspected that the goods were stolen and not fraudulently obtained or *vice versa*. What is contemplated is suspicion of a state of affairs that can only be described by the words stolen or fraudulently obtained. In this connection compare the case of *Rex v. Teh Peng Kin* referred to in 6 Malayan Law Journal at p.226 where it was held that a conviction under a charge of "fraudulently or dishonestly destroying a valuable document" was good. I distinguish this case from those under the Motor Vehicles Enactment, which were cited to me.

Conviction quashed.

[APPELLATE CRIMINAL JURISDICTION]
TERRELL, Ag. C.J.
September 29, 1938.

PUBLIC PROSECUTOR - - Appellant.

v.

AH FATT - - - - Respondent.

(SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 85 of 1938)

Sanitary Boards Enactment, Section 17 (ii)—By-law 2 (i) of Part IV of By-laws—hawking meat without licence.

The respondent had some pork over the handle of a bicycle at Pudu Road. There was some more pork hanging on a wire fence nearby. He had some scales for weighing the pork and supplied the meat to various persons who paid him therefor. On a charge of selling pork without licence the respondent was acquitted by the Magistrate on the grounds (1) that there was no evidence that the respondent was found hawking within the Sanitary Board area and (2) that the appellant was not an "itinerant vendor" of food-stuffs and therefore did not come within the definition of "hawker" in By-law (1) of Part IV of the By-laws made under the Sanitary Boards Enactment. On appeal to the Judge by the Public Prosecutor:—

Held, that, although the first point was not taken at the trial, the evidence showed that the first witness for the prosecution who was a Health Inspector was on a look-out for unlicensed hawkers in Pudu Road and that as in so doing he was acting in pursuance of an official duty there was a presumption that such duty was regularly performed within the Sanitary Board area.

Held, further that, if a person sells food in the street where he does not live and must have reached such place by walking or riding there with his foodstuffs for sale, he thereupon becomes 'itinerant' within the meaning of Part IV of By-laws under the Sanitary Boards Enactment and he does not divest himself of the character of an itinerant hawker merely by reason of the fact that he stays or stands still on the same place for an appreciable time.

MAGISTRATE'S CRIMINAL APPEAL.

M. C. Hay, Deputy Legal Adviser, for the Appellant.

Tengku Ismail for the Respondent.

Cur. Adv. Vult.

Terrell Ag. C. J. The charge against the defendant was as follows:—

> "That you on 24.5.38 at 7 a.m. did hawk meat to wit pork at Pudu Road without a licence from the Chairman in that behalf contrary to By-law 2(i) Part IV, and punishable under section 17(ii) (Cap. 137)".

It appeared from the evidence that on the morning in question the defendant had some pork on a board over the handle of a bicycle. There was some more pork hanging on a wire fence nearby. The defendant had some scales for weighing the pork, and supplied it to various persons who paid him therefor. The learned Magistrate found as a fact that the defendant was selling pork without a licence. Nevertheless he acquitted the defendant on two grounds:—

> (1) that there was no evidence that the defendant was found hawking pork within the Sanitary Board area;
>
> and